WOMEN'S LAW PROJECT

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September 30, 2011

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Room 445-G
Hubert H. Humphrey Building
200 Independence Avenue, SW
Washington, DC 20201

RE: Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act; CMS-9992-IFC2

Dear Secretary Sebelius:

The Women's Law Project (WLP), a legal advocacy organization dedicated to advancing the rights and status of women, writes in response to your request for comments regarding the coverage of preventive services under the Patient Protection and Affordable Care Act (hereinafter ACA). The WLP, for whom reproductive health care is a primary focus, commends the decision by the Department of Health and Human Services (HHS) to require health insurers to cover a number of women's preventive health care services, including the full range of FDA-approved contraceptive methods, counseling, and patient education, with no out-of-pocket costs. This decision is a huge step forward for fairness and improved health outcomes for women and their families. At the same time, however, WLP has serious reservations about the broad exemption to contraceptive coverage that HHS has proposed for some religious employers. The Women's Law Project urges HHS to eliminate this exemption altogether or at least to narrow its application only to ministerial employees.

The ACA addresses the many challenges women encounter in seeking preventive health care for themselves and their families. One of the law's key consumer protections was the guarantee that all new insurance plans will cover preventive services, including counseling, screenings, and interventions that have received either "A" or "B" recommendations from the United States Preventive Services Task

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Force.[1] The Women's Health Amendment required HHS to identify additional preventive health services for women that should be covered and provided to patients at no cost.[2] In fulfillment of this provision, HHS asked the Institute of Medicine (IOM) to recommend additional women's preventive health services, which it did on July 19th, and IOM's recommendations appropriately included no cost-sharing for a comprehensive range of women's preventive health services including contraceptive methods and counseling.[3] HHS took the important and commendable step of adopting the IOM's recommendations on August 1. The WLP is tremendously pleased by HHS's adoption of the IOM recommendations, and we believe that women and their families will benefit from improved health as a direct result.

The inclusion of contraception as a service that is required to be covered with no cost-sharing presents a tremendous step forward in improving the health status of women and their families. Contraceptive care and counseling is a critical component of women's health care. Contraception allows women to control the timing, number, and spacing of births, leading to improved health and mortality outcomes for themselves and their children. The ability to determine the timing of a pregnancy can prevent a range of pregnancy complications that can endanger a woman's health, including gestational diabetes, high blood pressure, and placental problems, among others.[4] In addition, an unintended pregnancy may have significant implications for a woman's health. A preexisting health condition such as diabetes, hypertension, or coronary artery disease may be worsened by a pregnancy.[5] A planned pregnancy allows a woman to take steps so she is sufficiently healthy to undergo pregnancy and childbirth.[6] Needless to say, the ability to control childbearing is essential to women's ability to participate as equals in the social, political, and economic affairs of the nation.

Cost and lack of insurance coverage have played a major role in limiting a woman's ability to secure access to contraception and to choose the contraceptive method that is right for her. A 2009 survey by the Guttmacher Institute found that because of the economic recession, 23% of women report having difficulty paying for birth control and 24% have put off a gynecology or birth control visit because of cost.[7] There is evidence that cost and lack of insurance coverage pose barriers to obtaining a postpartum tubal ligation, even among women who express a desire for the procedure.[8]

The exemption for certain religious employers that HHS has included in its Interim Final Rules (IFR)[9] broadly precludes certain women from receiving needed preventive care, undermines the

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[1] 42 U.S.C. § 300gg-13(a)(1).
[2] 42 U.S.C. § 300gg-13(a)(4).
[3] Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* (July 19, 2011) (hereinafter *Closing the Gaps*).
[4] March of Dimes, Pregnancy After 35 (May 2009), http://www.marchofdimes.com/Pregnancy/trying_after35.html.
[5] Rowena Bonoan & Julianna S. Gonen, Washington Bus. Group on Health, *Promoting Healthy Pregnancies: Counseling and Contraception as the First Step*, Fam. Health in Brief, Aug. 2000, at 2.
[6] *Id.*
[7] The Guttmacher Institute, "A Real Time Look at the Impact of the Recession on Women's Family Planning and Pregnancy Decisions," (Sept. 2009), accessed March 22, 2011, http://www.guttmacher.org/pubs/RecessionFP.pdf
[8] Andrea Ries Thurman and Torri Janecek, "One-year follow-up of women with unfulfilled postpartum sterilization requests," *Obstetrics and Gynecology* (2010), 116(5):1071-7.
[9] Specifically, the Interim Final Rules define an employer that can invoke the exemption as one that:

(1) Has the inculcation of religious values as its purpose;

intention of both the ACA and the Women's Health Amendment, and is prohibited by Section 1557 of the ACA. Rather than giving all women no cost contraceptive access to which they would be entitled, the exemption allows certain employers to a complete exemption from the requirement. As a consequence, employees of exempted religious employers will be required to pay for what the IOM has determined should be available at no cost, including even those employees who perform no religious function whatsoever.

Nothing in the ACA, its language or legislative history, allows for any limitations on contraceptive coverage or any other preventive service required by the law or its regulations.[10] On the contrary, the exemption for religious organizations violates Section 1554 of the ACA, entitled Access to Therapies, which states that the "Secretary of Health and Human Services shall not promulgate any regulation that ... (1) creates any unreasonable barriers to the ability of individuals to obtain appropriate medical care or (2) impedes timely access to health care services."[11] The religious exemption creates an unreasonable barrier for women seeking a form of medical care that the IOM found to be "appropriate medical care" for women of childbearing age on numerous grounds by requiring those who work for employers invoking the exemption to bear the substantial costs of contraceptive counseling and services.[12]

The religious exemption also constitutes impermissible sex discrimination under Section 1557 of the ACA which explicitly states that the Act does not "invalidate or limit" the protection afforded to individuals under Title VII.[13] As the Equal Employment Opportunity Commission explained, pursuant to the Pregnancy Discrimination Act,[14] employers who provide insurance coverage for other preventive health services but do not provide coverage for contraceptives engage in sex discrimination in violation of Title VII.[15] Title VII does not recognize a religious exemption for employers with respect to employee benefits; Title VII's religious exemption is narrowly limited to hiring decisions.[16] The religious exemption therefore serves to invalidly

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(2) primarily employs persons who share its religious tenets;
(3) primarily serves persons who share its religious tenets; and
(4) is a non-profit organization under section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Code. Section 6033(a)(3)(A)(i) and (iii) refer to churches, their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively religious activities of any religious order.

Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46621 (proposed Aug. 3, 2011) (to be codified at 45 CFR Part 147).

[10] The Department cites §2792 of the Affordable Care Act, as well as its general authority to issue regulations and promulgate interim final rules, but there is no specific authority in the preventive services provision, §2713, to exempt certain employers from its requirements.

[11] 42 U.S.C. §18113.

[12] Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* 89-91 (July 19, 2011)

[13] 42 U.S.C.S. §18116(b).

[14] 42 U.S.C. §2000e(k).

[15] Equal Employment Opportunity Commission, *Coverage of Contraception* (Dec. 2000), *available at* http://www.eeoc.gov/policy/docs/decision-contraception.html. Several district courts have agreed with the EEOC that excluding coverage for contraception in plans that otherwise covered a full range of preventive health services amounts to unlawful discrimination under Title VII, *see, e.g. Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266 (W.D. Wash. 2001), while only one court, the Eighth Circuit Court of Appeals, whose opinions bind only the seven states in that circuit, rejected that view. See *Standridge v. Union Pac. R.R. Co.*, 479 F.3d 936, 942-43 (8th Cir. 2007). The EEOC maintains its interpretation of the law that the denial of contraceptive coverage from an otherwise comprehensive employee health benefits plan is unlawful discrimination.

[16] 42 U.S.C. §2000e-1; *EEOC v. Fremont Christian School*, 781 F.2d 1362, 1367 (9th Cir. 1986).

exemption for employers with respect to employee benefits; Title VII's religious exemption is narrowly limited to hiring decisions.[16] The religious exemption therefore serves to invalidly limit the current protections afforded by Title VII for those employees working for employers who are required to comply with Title VII—those with fifteen or more employees.

In addition, from a Constitutional perspective, the compelling state interest in providing contraceptive coverage as an essential element of care that protects women from a range of harms outweighs any impact on a religious entity.[17] The contraceptive coverage requirement is a generally applicable neutral requirement that does not impose any significant burden on religion. It requires only that employers offer coverage without cost-sharing; it does not mandate either the use of or the approval of the use of contraception.

To the extent that HHS retains any religious exemption, we urge HHS to narrowly define the exemption to apply only to those employees performing ministerial duties, consistent with the narrow scope of employment- related religious exemptions.[18] As currently stated, the regulation overbroadly includes all employees of an entity, including those performing only non ministerial functions. Any such exemption should only apply to those employees whose duties involve theological matters relating to core religious matters. In addition, the exemption should be further limited so that it does not deny coverage of contraceptives used for non-contraceptive purposes, and does not restrict employee access to contraceptives through other avenues.

We commend HHS for adopting the IOM recommendations, and believe that women and their families will benefit tremendously with improved access to health services. We urge HHS to reject the requests by religiously affiliated organizations to expand the scope of the exemption in favor of fulfilling the intent of the ACA to address a critical aspect of women's health care by deleting the rule's religious exemption altogether, or, alternatively, narrowing the exemption to apply only to ministerial employees of qualifying religious entities.

Thank you for your consideration.

Respectfully,

Terry L. Fromson
Managing Attorney
Women's Law Project

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[16] 42 U.S.C. §2000e-1; *EEOC v. Fremont Christian School*, 781 F.2d 1362, 1367 (9th Cir. 1986).
[17] *Id.* at 1367-69.
[18] *EEOC v. Hosanna-tabor Evangelical Lutheran Church and School*, 597 F.3d 769, 777-781 (6th Cir. 2010) *cert granted* 2011 U.S. Lexis 2445 (Mar. 28, 2011) (stating that "the intent of the ministerial exception is to allow religious organizations to prefer members of their own religion and adhere to their own religious interpretations. Thus, applying the exception to non-members of the religion and those whose primary function is not religious in nature would be both illogical and contrary to the intention behind the exception. ")